

ORIGINAL

LAW OFFICES

FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.

2001 PENNSYLVANIA AVENUE, N.W.
SUITE 400

WASHINGTON, D. C. 20006-1851

TELEPHONE (202) 659-3494

TELECOPIER (202) 296-6518

WRITER'S DIRECT NUMBER

BEN S. FISHER
(1890-1954)

CHARLES V. WAYLAND
(1910-1980)

OF COUNSEL
JOHN Q. HEARNE

BEN C. FISHER
GROVER C. COOPER
MARTIN R. LEADER
RICHARD R. ZARAGOZA
CLIFFORD M. HARRINGTON
JOEL R. KASWELL
KATHRYN R. SCHMELTZER
DOUGLAS WOLOSHIN
DAVID D. OXENFORD
BARRY H. GOTTFRIED
ANN K. FORD
BRUCE D. JACOBS
ELIOT J. GREENWALD
CARROLL JOHN YUNG
GLENN S. RICHARDS
BARRIE DEBRA BERMAN
FRANCISCO R. MONTERO
ROBERT C. FISHER
BRUCE F. HOFFMEISTER
SCOTT R. FLICK
GREGORY L. MASTERS*
LAUREN ANN LYNCH
THERESA A. SMYTH
HOWARD C. GRIBOFF*
GUY T. CHRISTIANSEN*
MILES S. MASON
KEVIN M. WALSH*
MARK H. TIDMAN*
THEODORE N. STERN*
ROBERT L. GALBREATH*
DAWN M. SCIARRINO*
KAREN C. RINDNER

(202) 775-3540

June 19, 1995

RECEIVED

JUN 19 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

*NOT ADMITTED IN D.C.

VIA HAND DELIVERY

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Supplement to Informal Letter Comments
FCC Entrepreneur's Auction
PP Docket No. 93-253

Dear Mr. Caton,

Central Alabama Partnership L.P. 132 ("Central Alabama") and Mobile Tri-States L.P. 130 ("Mobile Tri-States"), by counsel, hereby submit this supplement to its informal letter comments dated June 16, 1995 to answer questions arising out of June 16, 1995 meetings between the undersigned counsel and Ruth Milkman, Senior Legal Advisor to Chairman Hundt, Rudolpho M. Baca, Legal Advisor to Commissioner Quello, Lisa B. Smith, Senior Legal Advisor to Commissioner Barrett, Brian Carter, Legal Advisor to Commissioner Barrett, and Donald Gips, Deputy Chief, Office of Plans and Policy.

In the June 16, 1995 meetings, the undersigned counsel discussed the views of Central Alabama and Mobile Tri-State that the entrepreneur's band auction rules must be substantively revised in light of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, No. 93-1841, 1995 U.S. LEXIS 4037 (June 12, 1995), and that such revision must be accomplished

No. of Copies rec'd
List ABCDE

849

through notice and comment rulemaking to comply with the Administrative Procedures Act ("APA"), 5 U.S.C. § 553 (1988).^{1/}

During the meetings, discussion arose as to how the FCC could expedite the substantive revision of its auction rules for the entrepreneurs' block, since continued delay in the auction may damage those who planned to bid, due to the potential unraveling of financial structures and the competitive disadvantages entrepreneurs will face as incumbent wireless operators become more entrenched. Two specific questions were raised: (1) whether the FCC could revise its auction rules without further notice and comment in the context of pending reconsideration proceedings in the auction docket; and (2) if the FCC opted for a fast-track comment period, whether the FCC could dispense with a reply comment period, as set forth in Section 1.415(c) of the Commission's Rules, 47 C.F.R. § 1.415(c) (1994).

We do not believe that the Commission can side-step notice and comment by issuing new substantive auction rules in response to *Adarand* in its pending reconsideration of the auctions docket. When an agency alters its course in rulemaking, as the FCC must do in response to the *Adarand* decision, the test for deciding whether a new round of comment is required is:

whether the final rule promulgated by the agency is a 'logical outgrowth' of the proposed rule. . . . [The U.S. Court of Appeals for the D.C. Circuit applies] that standard functionally by asking whether the purposes of notice and comment have been adequately served, that is, whether a new round of notice and comment would provide *the first opportunity* for interested parties to offer comments that could persuade the agency to modify its rule.

American Water Works Ass'n v. EPA, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (internal citations omitted; emphasis added). In this case, irrespective of whether a reconsideration on the constitutional issue is pending or not (and irrespective of whether parties to the proceeding filed comments on the constitutional issues in any previous phase of this proceeding), all comments and petitions were written under a presumption that *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled in part by Adarand*, was good law and was the base line upon which to constitutionally test the PCS race-based preferences.^{2/} Indeed, the issue of promulgating auction

^{1/} The informal letter comments filed with the Secretary on June 16, 1995 summarizes Central Alabama and Mobile Tri-State's arguments, and is incorporated herein by reference.

^{2/} The FCC set this thought process in motion in its Notice of Proposed Rulemaking, Implementation of Section 309(j) of the Communications Act: Competitive Bidding, 8 FCC Rcd 7635, 7646 ¶ 73 (1993) (establishing -- without question -- *Metro's* intermediate scrutiny standard as the constitutional test of the proposed race and gender-
(continued...)

preferences under a strict scrutiny standard became an issue of first impression on June 12, 1995, the date the *Adarand* decision significantly altered the law upon which the FCC's initial rulemaking comments were based. Any revision to the auction rules in response to *Adarand* cannot be a "logical outgrowth," as this is *the first opportunity* for all parties to comment on how to revise the auction rules to comport with *Adarand*.

Furthermore, the FCC cannot unilaterally harmonize its auction rules as "interpretive" of *Adarand* without notice and comment, for the *Adarand* decision does not dictate precise criteria for the FCC to interpret that would validate a race-based program under the strict scrutiny test.^{3/} Courts view agencies as violating the APA by adopting, without notice and comment, new substantive regulations which, although consistent with the judicial decision that invalidated the prior regulations, forecloses other options and conclusively affects the rights of the parties involved. See *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994).

The fact is: as of the date hereof, the FCC has yet to formally request comment on how to proceed with auction preferences under the law as recast by *Adarand* on June 12, 1995. Chairman Hundt opened the floor to informal discussion in his speech at Howard University on June 13, 1995,^{4/} which invitation was reported in the trade press.^{5/} However, such informal requests for comment do not satisfy the APA which unequivocally states: "General notice of proposed rulemaking shall be published in the Federal Register" 5 U.S.C. § 553(b). Congress requires Federal Register publication in its statute to protect the due process interests of "the outsiders," i.e., those parties outside the beltway who are not directly connected to the stream of Washington inside information such as copies of the Chairman's informal speech at a University or specialized trade newsletters. And, although there may be a good argument that public relations and press accounts reach more people around the country than the Federal Register, the FCC does not have the power to change the statute. Any party challenging the FCC

^{2/}(...continued)

based preferences). Therefore, it is no surprise that "[v]irtually all of the commenters agree[d] that Metro's intermediate scrutiny standard should be applied." Second Report and Order, Implementation of Section 309(j) of the Communications Act: Competitive Bidding, 9 FCC Rcd 2348, 2398 ¶ 289 (1994).

^{3/} In fact, two of the Justices in the *Adarand* majority would likely find no affirmative action program valid.

^{4/} The FCC issued a News Release, along with the full text of the Chairman's speech in its daily releases, which, although available to the public either directly or through various distribution sources, is primarily viewed by the communications bar.

^{5/} See, e.g., *FCC Postpones Application Deadline for Entrepreneurs' Block Auction*, Communications Daily, Vol. 15, No. 114 (June 14, 1995), at 1.

under the APA will likely argue that, until such time as Congress revises the APA's Federal Register requirements to reflect updated methods of establishing "notice" under procedural due process, the FCC has to follow the statute.^{6/}

In doing so, the FCC does not need to write a lengthy Further Notice of Proposed Rulemaking. The Commission can simply refer to *Adarand*, and state that, in view of the new constitutional standard set by the case, specific proposals on proceeding with the Block C auction is open to comment on an expedited basis. By focusing the comments on specific proposals, such as the one contained in Central Alabama and Mobile Tri-States' June 16, 1995 letter, the Commission will assist parties in narrowly tailoring their comments on those proposals, or some variation thereof, with a likely reduction in pleading length and the number of comments submitted "off the subject." The FCC could even set a reasonable page limit for comments, such as ten pages.

Which brings us to the issue of disposing with reply comments. Our research has not turned up an answer on whether the Commission may dispense with reply comments through a waiver of its own rules. Although the APA makes no reference to reply comments,^{7/} the Commission's rules give parties a right to reply,^{8/} a right parties will fight for if taken away. Our research found one recent instance in which the Commission promulgated rules arising from a Petition for Reconsideration without completion of the comment cycle. See Codification of the Commission's Political Broadcasting Rules, 9 FCC Rcd 5288 (1994). However, this situation is inapposite, as the Commission faced the urgency of an approaching election date over which it has no control, as compared to the Block C auction date, over which the Commission has complete control. Furthermore, we cannot predict whether an appeals court would have affirmed the Commission's action in the political broadcasting case, and have not found any case where an appeals court affirmed an agency's decision to dispense with a reply comment period.

Therefore, we advise caution on the question of dispensing with reply comments, as it leaves the door open for procedural challenge to test the issue, and the uncertainty is simply not

^{6/} Accord MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2233 (1994) (Congress, not the FCC, has the authority to change a statute's mandatory tariff filing requirements to reflect modern times).

^{7/} "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

^{8/} "A reasonable time will be provided for filing comments in reply to the original comments" 47 C.F.R. § 1.415.

worth the ten additional days necessary to solicit reply comments.^{2/} Furthermore, how many deals will truly dissolve due to a 10 day reply period? Few (if any), for all deals will have the assurance that the Commission has followed its rules and will not be subject to procedural challenges. In fact, we see decided advantages to an expedited reply period. If the Commission's proposals shift in response to the comments, cutting off the opportunity to reply to the comments on file may lead to uncertainty as to whether the shifted proposal can be considered a "logical outgrowth" of the proposal made.^{10/} A reply period will guaranty that the Commission's new auction rules fall squarely into the logical outgrowth test, and the proceeding becomes bullet proof.

If the Commission wishes to set a page limit for replies, we would suggest 25 pages as reasonable. Anything shorter could cause parties to argue that 10 pages, for example, is unreasonably short to respond to the plethora of comments that would be filed.

Finally, Central Alabama and Mobile Tri-States would like to re-emphasize the importance of the Commission accepting new Block C applications in concert with the APA's 30 day Federal Register publication period.^{11/} As in the discussion of dispensing with the reply comment period, the extra time needed to fully execute the Commission's APA obligations is well worth the certainty that PCS bidders seek in purchasing this valuable spectrum. The 220 MHz industry recently settled a protracted lawsuit over this very APA requirement.^{12/} The Commission surely does not want the PCS auction rules to become the vehicle in which this requirement is tested again. The Commission may actually begin accepting applications early, so long as the cut-off date is not prior to the effective date of the new rules.

^{2/} Even if the Commission is inundated with comments, 10 days should give enough opportunity for all parties to review them and file replies, thereby giving the FCC the ability to deny extension requests in an effort to expedite the proceedings.

^{10/} The opportunity for parties to comment on counterproposals in reply comments allows the Commission to consider those counterproposals in the ultimate rulemaking. See, e.g., TV Channel Assignment at Vallejo-Fairfield, Calif., 25 R.R.2d 1742, 1746 ¶ 13 (1972) (citing Owensboro on the Air, Inc. v. United States, 262 F.2d 702 (D.C. Cir. 1958), cert. denied, 360 U.S. 911 (1959)).

^{11/} "The required publication or service of a substance rule shall be made not less than 30 days before its effective date" 5 U.S.C. § 553(d).

^{12/} Evans v. FCC, Case No. 92-1317 (D.C. Cir. filed July 30, 1992), Order (D.C. Cir. March 19, 1994) (per curiam).

William F. Caton, Secretary
June 19, 1995
Page 6

If the Commission has any additional questions regarding the information and/or opinions expressed in the above letter, please contact this office.

Respectfully submitted,



Eliot J. Greenwald
Howard C. Griboff

cc: Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Susan Ness
Commissioner Rachelle B. Chong
Ruth Milkman
Rudolfo M. Baca
Lisa B. Smith
Jane Mago
Jill Lockett
Mary P. McManus

William E. Kennard
Peter A. Tenhula
Daniel M. Armstrong
Robert M. Pepper
Donald H. Gips
Regina Keeney
Gerald P. Vaughan
Jackie Chorney
Kathleen O'Brien Ham
Rosalind Allen
Anthony L. Williams
Catherine Sandoval